United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

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Date: September 11, 1997

Case No: **95 INA 234**

In the Matter of:

GARCIA & GALUSKA, INC.,
Employer,

On Behalf of:

MARIO VENTURA,
Alien

Appearance: M. C. Liu, Esq., of New York, New York

Before: Huddleston, Holmes, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Mario Ventura, (Alien) filed by Employer Garcia & Galuska, Inc., (Employer) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Boston, denied the application and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor determines and certifies to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[1]

STATEMENT OF THE CASE

On March 4, 1993, the Employer filed an application for labor certification to enable the Alien, a Portuguese national, to fill the position of executive administrative assistant to a general partner of a firm of consulting engineers located in New Bedford, Massachusetts.

The job offered was described as follows:

> Assist general partner of company in all phases of operations. Will communicate and correspond in Portuguese with contractors and sub-contractors and issue invoices and checks and otherwise relieve officials of clerical work and administrative and business detail. File correspondence and other records.

The special requirement of the position was that the employee "Must speak Portuguese." AF 47. The Employer explained its Portuguese language special requirement in the following terms:

> Knowledge of the Portuguese language is a special requirement of this job position because of the heavy communication and correspondence duties with contractors and subcontractors who speak Portuguese. We are located between several large Portuguese communities and have a niche market servicing many of the Portuguese small businesses in the area. Our ability to capture this niche market is solely because we can communicate in Portuguese both to our predominantly Portuguese clients and Portuguese contractors hired to do the jobs. ...

AF 49.

On June 15, 1994, the CO issued a Notice of Findings to notify the Employer of the Department of Labor's intention to deny the application, and permitted the applicant to rebut the findings or remedy the defects noted. The CO said that the Employer's job requirements were unduly restrictive and were tailored to meed the Alien's experience. Departing from its full

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[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

description of the job to be performed, the Employer's report on the "Results of Recruitment" demonstrated that it now required responding applicants to possess two years of experience as an administrative assistant, although its specified no need for college experience while requiring fluency in the Portuguese language. AF 27, 28, 47; 20 CFR § 656.21 (b)(2)(i). Briefly stated, Employer's rebuttal offered substantial arguments that were not supported by documentation.

Language. Employer's language requirement, observed the CO, was unduly restrictive and was a personal preference, rather than a business necessity in the business conducted by this Employer. Employer's assertions in the Supplement to ETA 750 Application were examined and weighed. If made more specific and documented, the niche market Employer described could support a requirement that the job be filled by an applicant who was fluent in the Portuguese language. Employer did not establish these facts, however, nor did it offer assertions more explicit than the general statements set out in AF 49.

The Employer's rebuttal of July 20, 1994, consisted of a letter signed by one of its partners. AF 15, 16 17. In spite of the guidance offered by the CO, the Employer failed to provide any Portuguese language documents that the applicant would be required to translate into English, document either the total number of clients the Employer deals with or the percentage of clients who cannot communicate in English. While the Employer identified the specific nature of its business, it did not document assertions that the absence of the language would have an adverse impact on its business.

Job criteria. Analysis of the work performed by an employee in this position indicates that the need for a language requirement was not demonstrated by documentation or other proof that the contractors and subcontractors with whom Employer deals for its clients employed crews that spoke Portuguese and not English. In making this argument, the Employer stated, however, that

> In order for us to successfully monitor a construction site so as to ensure conformance to our plans, specifications and designs, it is imperative that we observe, communicate and correspond in Portuguese on a continuous basis with the contractors and subcontractors.

AF 16. This statement demonstrated that Employer's application and the criteria that it implemented in its recruitment process materially departed from the job description on which Employer based its application. Taken without more, the Employer's job specifications now appeared to describe the work of a clerk of the works on the construction jobs it supervised for its clients. This suggests that a heretofore unexpressed selection criterion

was applied under which the administrative assistant now was function as a construction inspector on the sites of construction projects for which Employer was responsible. As these inferences are in consistent with the Employer's application, the rhetoric in the Employer's response to the CO's Notice of Findings either did not apply to this job opportunity or was not supported by the facts Employer purports to have proven. AF 16, 17.

Final Determination. On July 25, 1994, the CO issued a Final Determination in which he rejected the Employer's rebuttal on grounds that (1) the Employer had not established the business necessity of the special language requirement; and (2) that the Employer failed to establish that the U. S. workers who applied for this job opportunity were rejected solely for lawful job-related reasons. AF 7, et seq. On August 29, 1994, the Employer requested reconsideration and review of that denial. AF 2-6.

DISCUSSION. 20 CFR § 656.21(b)(6) provides that, if U.S. applicants applied for the job opening and were rejected, the employer must document that such applicants were rejected solely for job-related reasons. 20 CFR § 656.20(c)(8) provides that the job opportunity must be demonstrated to be open to any qualified U.S. worker. 20 CFR § 656.24(b)(2)(ii), provides that in deciding whether to grant labor certification, the CO must consider whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity. Such U. S. worker will be considered able and qualified, if "by education, training, experience, or a combination thereof, [the worker] is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."

In general, a job applicant is considered qualified for the position who meets the minimum requirements specified by the employer's application for labor certification. **The Worcester Co, Inc.,** 93 INA 270 (Dec. 2, 1994); **First Michigan Bank Corp.,** 92 INA 256 (July 28, 1994).[2] Even if a job applicant's resume does not meet all of the job requirements, if that applicant's resume shows a broad range of experience, education, and training, the reasonable possibility arises that the applicant is qualified, and the employer is expected to investigate further the applicant's credentials by an interview or otherwise. **Dearborn Public Schools,** 91 INA 222 (Dec. 7, 1993) (en banc); **Gorchev & Gorchev Graphic Design,** 89 INA 118 (Nov. 29, 1990)(en banc). An employer is under an obligation to attempt alternative means of contact when initial means are unsuccessful. **Yaron**

[2]However, an employer may reject an applicant who meets the stated requirements but is nevertheless demonstrably incompetent to perform the main duties of the job, based upon information obtained from references or objective testing during the interview. **First Michigan Bank Corp.,** supra.

Development Co., 89 INA 178 (April 19, 1991)(en banc). In this regard, an employer's unsuccessful attempts at telephone contact, without more, are not sufficient to establish a good faith effort to recruit. See, e.g., **Gilliar Pharmacy,** 92 INA 003 (June 30, 1993).

The Alien's application indicated that although he had not completed high school, he was at that time the owner-manager of an agricultural supply business in Ponta Delgada, Azores, having previously managed a similar business for about five years. Thereafter, the Alien had worked for another five years as an administrative assistant in an agricultural bank in Ponta Delgada. In these jobs the Alien communicated and corresponded with businesses and subcontractors, issued invoices and checks for his employers. The Alien otherwise relieved his supervisors of details in clerical work and administrative and business matters; and filed various items of correspondence and other records. If the assertions in the administrative file were documented, they would support the inference that the Alien's capacity to perform the tasks for which Employer proposes to hire him is limited to his claimed work experience in the Azores, where the Portuguese language is spoken. While the Employer indicated it intended to submit at a later date the requisite documents demonstrating that the Alien possesses qualifications and skills that prove he meets the requirements for work as an executive administrative assistant for a firm of consulting engineers, such documents do not appear in the administrative file. AF 50-51.

Job notice. Employer's job notice and published invitation for inquiries stated the following work requirements for its proposed position as an executive administrative assistant:

> Assist general partner of company in all phases of operation. Will communicate and correspond in Portuguese with contractors & subcontractors and issue invoices & checks & otherwise relieve officials of clerical work and administrative & business detail. File correspondence and other records. Must speak Portuguese.

Responses. Cecilia Fernandes, Sonia Serrao, Perry J. Conchinha, and Silmara R. Lucina submitted resumes and applied for the job. All except Ms Fernandes indicated fluency in Portuguese. Assuming that the Employer's representations as to the need for language fluency were demonstrated, her resume would not have been qualifying. The resume of Ms Serrao met the language criterion, and her educational record said she had an associate in arts degree that included a major in "administrative assistant." On the other hand, the content of that major was not disclosed, her work experience was limited jobs in clothing store sales, and she did not indicate a background in engineering or construction work of the type Employer's application described.

For these reasons the Employer's rejection of both of these applicants out of hand is not questioned.

Ms Lucina was a bachelor of science with a concentration in computer science, the details of which her resume described. She had worked in a Brazilian bank, and her other work experience was in a labor supply firm. Her work experience included secretarial and bookkeeping functions that were similar to the duties Employer described, as well as significant duties that required her to use her skills in both Portuguese and Spanish. While she had no experience in work for an engineering consultant, her background suggested that she was capable of learning to perform the functions described in Employer's work specifications with minimal effort.

Finally, Ms Conchinha's resume noted a recent baccalaureate degree in the humanities, and an associate in arts degree in finance. During her college years she worked as administrative assistant for an engineering consultant. This position included bookkeeping and similar fiscal clerical duties, drafting correspondence and engineering reports, and telephone and personal contact with clients and suppliers. After graduation this applicant worked in a compressor equipment sales firm, for which she engaged in "heavy customer service with clients." As her resume also included an internship as a translator and as a tutor in Spanish and Portuguese, she clearly indicated fluency in the required language. AF 29-32.

Result of recruiting. The Employer's report of the result of required recruiting efforts is not consistent with the position it advertised. First, each of the candidates it rejected had an academic education materially superior to that of the Alien, who did not finish high school. Moreover, the Alien's experience as an employee of an agricultural bank and in agricultural equipment sales hardly equipped him to handle any role in the supervision of the construction work Employer described, except that he could speak and write in Portuguese language. His resume displayed no background that related in any way whatsoever to the Employer's description of its business as an engineering consultant.

While the Employer's rejection of Ms Fernandes and Serrao was clearly supported by their resumes, the qualifications of Ms Lucina, if fairly considered, indicated a potential for training in Employer's specialized work. Ms Conchinha's resume, however, met and was superior to the qualifications of the Alien to perform the job described by Employer's application. As Ms Conchinha clearly was well qualified and indicated by her application that she was willing to perform this job at a wage rate some 5% below the prevailing wage, the Employer's reasons for the rejection of this candidate appear on their face so frivolous as to be beyond the job related reasons appropriate to

the process established under 20 CFR § 656.21(b)(7). AF 21, 27, 28.

In short, the Alien's educational qualifications and experience barely equip him to perform the job described in Employer's rebuttal, regardless of whether or not his facility in the Portuguese language is considered. The Employer's parsing of the experience requirements it later adopted have nothing to do with the description of the job it advertised, which was the basis of its application under for certification the Act. At least one of the applicants discussed above, if not more, was qualified to hold the job, even as described in the enlarged criteria newly stated in the Employer's rebuttal. Moreover, the same job applicant or applicants were qualified to be hired for the job described in the Employer's application, as originally stated. While Alien might marginally qualify by a narrow interpretation of the original job description, at least one of the applicants discussed above was qualified by her resume to be hired for that job. Moreover, the Employer did not indicate that it interviewed any of these applicants in person, although it indicated that it interviewed these applicants by telephone.[3]

Summary. The CO concluded that either the recruitment attempts by the Employer were inadequate or the Employer's implementation of the recruitment process was vitiated by its capricious refusal to give serious consideration to any of the four U. S. worker job applications for this position. We agree. After careful examination of the appeal file we conclude that the Employer has failed to demonstrate that there were no qualified U.S. applicants available for this job opportunity, and so has failed to sustain its burden of proof under the Act and regulations. Consequently, this application should be denied for failure to establish a good faith effort to recruit, as provided by law in this case.

Accordingly, the following order will enter.

[3]The rejection of Ms Fernandez is irrelevant to any part of this application because, assuming that the Employer could establish the business necessity of fluency in Portuguese, she is the only one of the four applicants who did not state on her resume that she could speak the language.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **Garcia & Galuska, Inc.**
(Mario Jorge Ventura)

Case No. : 95-INA-234

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: